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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 10/605,754 | 10/23/2003 | Joseph B. Richey II | 12873/04666 | 2753 |
| 24024 | 7590 | 11/15/2004 | EXAMINER | |
| CALFEE HALTER & GRISWOLD, LLP 800 SUPERIOR AVENUE SUITE 1400 CLEVELAND, OH 44114 | | | WIEKER, AMANDA F. | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 3743 | |

DATE MAILED: 11/15/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

| | | | |
|------------------------------|-------------------------------|-------------------------------|--|
| Office Action Summary | Application No. 10/605,754 | Applicant(s) RICHEY ET AL. | |
| | Examiner Amanda F. Wieker | Art Unit 3743 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 October 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 October 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Terminal Disclaimer

1. The terminal disclaimer filed on 20 October 2004 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent Number 5,988,165 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Claim Objections

2. Claims 2, 6, 8, 11 and 17 are objected to because of the following informalities:

In claim 2, at line 2, the phrase "the amount of said oxygen" lacks proper antecedent basis. It appears that this phrase should be replaced with --the amount of oxygen--. An identical problem occurs in claim 8.

In claim 6, at line 6, the word "being" is misspelled (as "beig"). Appropriate correction is required.

In claim 6, at line 11, it is suggested that a hyphen be placed between "oxygen" and "enriched" for consistency.

In claim 11, at line 4, the phrase "said oxygen product storage tank" lacks proper antecedent basis. It appears that this phrase should be replaced with --said high pressure storage tank--.

In claim 17, at line 2, the phrase "said storage tank" lacks proper antecedent basis. It appears that this phrase should be replaced with --said high pressure storage tank--.

Double Patenting

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent

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possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-24 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-24 of U.S. Patent No. 6,805,122 to Richey, II et al. ('122). Although the conflicting claims are not identical, they are not patentably distinct from each other because '122 discloses an apparatus for supplying oxygen-enriched gas to a patient and to a high pressure storage tank, comprising: a first compressor which receives ambient air; an oxygen concentrator which produces oxygen enriched gas, said oxygen concentrator having an inlet which receives air from said first compressor and oxygen enriched gas to outlet flow line which operatively delivers said oxygen enriched gas from said product tank to a patient, said flow line having a pressure from about 3 to about 10 psi ; a second outlet flow line which operatively delivers said oxygen enriched gas from said an outlet which provides a product storage tank; a first product tank to a buffer to about 22 psi, said tank at a pressure from about 12 buffer tank operatively connected by a flow dial compressor, line to a radial compressor, said radial compressor being capable of oxygen enriched gas and transferring compressing said the oxygen enriched gas to a high pressure storage tank, and a prioritizing apparatus which terminates the operation of said radial compressor when the oxygen concentration of said oxygen enriched gas operatively delivered to said radial compressor falls below a predetermined value so that said oxygen enriched gas is continuously supplied to the patient.

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'122 further discloses all of the claimed limitations of instant claims 1-24, but '122 fails to specify the exact pressure values of the high pressure storage tank, low pressure patient gas flow line, and moderate pressure line. However, it would have been obvious to have provided the apparatus for storing and supplying oxygen-enriched gas to a patient, wherein the high pressure storage tank stores gas at a pressure of 21psi to 4000psi, and the low pressure patient gas flow line contains gas from 1psi to 14psi, and the moderate pressure line stores gas from 5psi to 21psi, as is commonly done in the art to provide safe transport and delivery of a breathing gas to a patient.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amanda F. Wieker whose telephone number is 703-306-4056. The examiner can normally be reached on Monday-Thursday, 8:30 - 6:00 and alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry Bennett can be reached on 703-308-0101. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Henry Bennett
Supervisory Patent Examiner
Group 3700

Amanda Wieker
Amanda F. Wieker
Examiner